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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.	
09/759,567	01/11/2001	Fran Gare	1032-2	9679	
7590 09/09/2004			EXAMINER		
Keusey, Tutunjian and Bitetto, P.C.			WONG, LESLIE A		
14 Vandervente	r Avenue				
Suite 128			ART UNIT	PAPER NUMBER	
Port Washington, NY 11050			1761		

DATE MAILED: 09/09/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary Application No. GARE, FRAN GARE, FRAN Easile Wong Art Unit Lesile Wong Art Unit T761 Art Unit T761 Art Unit T761 Art Unit T762 Art Unit T762 Art Unit T762 Art Unit T763 Art Unit T764 Art Unit T764 Art Unit T765 Art Unit T765 Art Unit T766 Art Unit T766 Art Unit T767 Art Unit T767 Art Unit T767 Art Unit T768 Art Unit				() (
Examiner Art Unit		Application No.	Applicant(s)	1.			
Lessie Wong 1761		09/759,567	GARE, FRAN				
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A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on July 23, 2004 has been entered.

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 47 and 57 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claims 47 and 57 are indefinite, as the claims do not further limit as the independent claims are directed to a baked product. Specifically, independent claims 41 and 50 refer to "a baked product mix." It is not clear whether Applicant is claiming a baked product or a different composition. The use of "a baked product mix" in claims 41 and 50 render claims 47 and 57 confusing at best.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

⁽a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

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Claims 41-60 are rejected under 35 U.S.C. 103(a) as being unpatentable over Takemori et al, Kim, and Pflaummer et al.

Takemori et al disclose a foodstuff, including baked products, containing xylitol, whey protein, and a soluble dietary fiber (see entire patent and the claims, especially claims 1, 2 and 13).

Kim discloses a light bakery product comprising xylitol, a calcium salt, and a stabilizer (see entire document, especially column 2, lines 40-48 and Examples I and III).

Pflaummer et al disclose the use of fiber in baked goods (see entire document).

The claims differ as to the specific amounts and the specific utilization.

The prior art teaches the use of xylitol, whey protein, and fiber/stabilizer as conventional in the art.

Once the art recognizes the use of a given component for a specific function then the use and manipulation of this component would be no more than optimization, see In re Boesch 205 USPQ 215.

Applicant is using known components for their art-recognized function to obtain expected results.

It would have been obvious to a person of ordinary skill in the art, at the time the invention was made, to use the claimed component amounts in a baked product because the prior art teaches the conventional use of the claimed components in a baked product.

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Attention is invited to In re Levin, 84 USPQ 232 and the cases cited therein, which are considered in point in the fact situation of the instant case, and wherein the Court stated on page 234 as follows:

This court has taken the position that new recipes or formulas for cooking food which involve the addition or elimination of common ingredients, or for treating them in ways which differ from the former practice, do not amount to invention, merely because it is not disclosed that, in the constantly developing art of preparing food, no one else ever did the particular thing upon which the applicant asserts his right to a patent. In all such cases, there is nothing patentable unless the applicant by a proper showing further establishes a coaction or cooperative relationship between the selected ingredients which produces a new, unexpected, and useful function. In re Benjamin D. White, 17 C.C.P.A (Patents) 956, 39 F.2d 974, 5 USPQ 267; In re Mason et al., 33 C.C.P.A. (Patents) 1144, 156 F.2d 189, 70 USPQ 221.

It is noted that Applicant does not specifically claim either gluten free or sugar free.

It is also noted that Applicant refers to commercial success and long-felt need but no evidence has been submitted.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Leslie Wong whose telephone number is 571-272-1411. The examiner can normally be reached on Tuesday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Leslie Wong Primary Examiner

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LAW September 7, 2004